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8 CHAO FAN XU

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 vs.)

2:02-cr-00674-PMP-LRL

14 CHAO FAN XU, *et al.*)

15 Defendants.)

16 **DEFENDANT XU CHAO FAN'S SENTENCING MEMORANDUM**
17 **INCLUDING OBJECTIONS TO PRESENTENCE REPORT**
18 **AND MOTION FOR DOWNWARD DEPARTURE**

19 CERTIFICATION: This Objection is timely filed.

20 COMES NOW the Defendant, XU Chao Fan, by and through his attorney,
21 MITCHELL L. POSIN, ESQ., and hereby submits his sentencing memorandum, objects to
22 the Presentence Investigation Report prepared for the above-entitled case, and moves for a
23 downward departure.

24 DATED this 7 day of April, 2009.

25 Respectfully submitted,

26 /S/
27 Mitchell L. Posin, Esq.
28

Objections

The Defendant hereby objects to portions of the following paragraphs of the Presentence Report, as more fully set forth hereinafter:

Paragraphs 9, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 33, 35, 37, 38, 44, 45, 46, 47, 51, 52, 54, 56, 57, 59, 62, 63, 64 67, 77, 78, 79, 80, 81, 82, 83, 84, 90, 92, 93, 96, 105, 106, 120, 121, 122 and 123.

Facts

Defendant XU objects to the allegations in the PSR that “*the codefendants acted together in the attempt to defraud the Bank of China of at least \$482 million dollars,*” as alleged in paragraph 13, and continued in paragraphs 14 through 27.

Although the government has used the number of \$482 million, it is submitted that the evidence elicited at trial did not uniformly support such a figure, nor is such a figure a necessary corollary of the guilty verdict. Rather, it is the recollection and submission of the undersigned that numerous percipient witnesses of the events, who were called by the government, testified to the effect that approximately \$170 million of the bank’s money was lost in currency trading in the early 1990’s, and that this loss was essentially a bad investment decision on behalf of the bank rather than any attempt to embezzle or convert the money in question. It was further the testimony that approximately \$300 million dollars was loaned from the bank to the Kaiping Polyester Factory and other industrial enterprises, and that while some unknown portion of this money was ultimately sent to various Hong Kong entities controlled by the defendants, that machinery and raw materials of an unknown value were obtained and sent back to the

1 industrial concerns. It was further the testimony that some \$10 million or more that was
2 loaned by the bank was used to construct the 32 story Everjoint Peninsula Hotel and
3 adjoining office building that continues to house the Bank of China in Kaiping.
4 Obviously, the building in Kaiping in which the Bank of China remains cannot be said to
5 form any part of a loss for relevant conduct amount.
6

7 As regards Mr. XU's relationship with Kwang Wan Fang and Mei Xie Peng as
8 discussed in paragraph 8 and paragraphs 28 through 35 and 47 through 53 of the PSR, it
9 is likewise submitted that the government's proffered testimony, particularly that of Mei
10 Xie Peng, is consistent with Mr. XU's submission that he was never in fact married to
11 Ms. Kwang, and that his marriage to Mei Xie Peng was a legitimate. Again, it is
12 submitted that the allegations found in the above-cited paragraphs are not necessary to
13 any guilty verdict, and especially not counts four through six of the Second Superseding
14 Indictment, which allege only that Mr. XU used "*any false claim or statement*" in order
15 to obtain a United States visa in the name of Hui Yat Fai.
16
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18 While the leadership role adjustment found in paragraph 66 is not disputed for
19 purposes of sentencing, defendant XU Chao Fan does object to specific instances in the
20 PSR where he is alleged to have initiated various plans, and then forced, controlled,
21 ordered, or directed other individuals to perform many actions in pursuit thereof.
22 Examples are found in paragraphs 16, 17, 30, 31, 37, 38, 44, 47, and 51.
23

24 **Guideline Calculations**

25 **Application of U.S.S.G. §2S1.1**

26 Paragraph 63 of the PSR states that "*the defendant committed the specified*
27
28

1 *unlawful activity of fraud, and a scheme and attempt to defraud against a foreign bank . .*
 2 *. . .*¹ The paragraph goes on to state that therefore, under 2B1.1, “*30 levels must be added*
 3 *as the loss exceeded \$400,000,000.00*” This is incorrect.

4
 5 U.S.S.G. §2S1.1. currently² provides that the base offense level for
 6 Laundering of Monetary Instruments and Engaging in Monetary Transactions in Property
 7 Derived from Unlawful Activity is “*the offense level for the underlying offense from*
 8 *which the laundered funds were derived,” but only if: “(A) the defendant committed the*
 9 *underlying offense (or would be accountable for the underlying offense under subsection*
 10 *(a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be*
 11 *determined.*” (Emphasis added). It is submitted that here, the defendant did not commit
 12 the underlying offense of bank fraud, as suggested in the PSR. It is further submitted that
 13 the offense level for the underlying offense cannot be determined.

14
 15 In the case of United States v. Lewis, 67 F.3d 225 (9th Cir. 1995), the defendant
 16 was the branch manager of the Portland, Oregon branch of the Hong Kong and Shanghai
 17 Bank. The defendant made a large authorized loan to an entity called “Financial Reserve
 18 Group,” or FRG. After learning that the principals of FRG were the targets of a criminal
 19 grand jury investigation, the defendant concluded that it was unlikely that FRG's debt
 20 would ever be repaid. Rather than reporting the bad debt to his superiors, which would
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22
 23 ¹ Defendant likewise objects to Paragraph 9 of the PSR as irrelevant for the
 24 reasons discussed hereinafter regarding paragraph 63: as a matter of United States law,
 25 Defendant does not, and could not stand convicted of committing Bank Fraud against the
 26 Bank of China.

27 ²U.S.S.G. 2S1.1 was amended in 2001, as discussed infra.

1 have caused the branch to reflect a loss, Lewis agreed to make an unauthorized loan to
2 “Diers,” an FRG principal who had been exonerated in the criminal investigation. Diers
3 agreed to use part of the loan to pay off the FRG debt. This allowed the Portland branch
4 to carry a profit on its books for that year. With the remaining portion of the loan, Diers
5 acquired real estate for a development project. The defendant continued to make
6 unauthorized loans to Diers for the development project, each of which ultimately formed
7 the basis for a count of bank fraud.
8

9 The Lewis Court reversed the convictions, stating, “[w]e hold that HKSB's
10 Portland branch was not "operating under the laws of the United States" within the
11 meaning of § 1344(b)(5), and that the district court therefore erred in denying Lewis'
12 motion to dismiss the bank fraud charges for lack of jurisdiction.”³
13

14 Similarly in U.S. v. Ali, 266 F.3d 1242, (9th Cir. 2001). The defendant was
15 convicted of bank fraud. The Ninth Circuit reversed, despite testimony from a loan
16 officer claiming the bank was federally insured, and despite the introduction of an
17 insurance certificate from several years earlier. The Court stated, “we hold that this
18 evidence is insufficient as a matter of law to establish beyond a reasonable doubt that the
19 bank was federally insured at the time of the offenses.”
20

21 If the defendants in Lewis and Ali could not be convicted of the United States
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25
26 ³ The Lewis Court notes that before the enactment of § 1344 as part of the
27 Comprehensive Crime Control Act of 1984, no federal provision specifically criminalized
28 bank fraud. United States v. Lewis, 67 F.3d 225 (9th Cir. 09/28/1995)

1 crime of Bank Fraud for defrauding a U.S. branch of a foreign bank,⁴ then *a fortiori* the
 2 defendant in the instant case could not have been convicted under the then version of 18
 3 U.S.C. § 1344. Indeed, the government has not charged Mr. XU with violating 18 U.S.C.
 4 § 1344, and nor is 18 U.S.C. § 1344 mentioned in the Second Superseding Indictment.⁵

5
 6 Although 18 U.S.C. § 1344 has been amended since the Lewis case to delete the
 7 requirement that the financial institution which is defrauded be federally chartered or
 8 insured,⁶ there is still a requirement that the financial institution be, in fact, a “financial
 9 institution.” Thus, we must now determine whether the Kaiping branch of the Bank of
 10

11 ⁴ Prior to 1990, 18 USC 1344 provided as follows:

12 *Whoever knowingly executes, or*
 13 *attempts to execute, a scheme or artifice--*

14 *“(1) to defraud a federally chartered or insured financial*
 15 *institution; or*

16 *“(2) to obtain any of the moneys, funds, credits, assets,*
 17 *securities or other property owned by or under the custody or*
 18 *control of a federally chartered or insured financial institution by*
 19 *means of false or fraudulent pretenses, representations, or*
 20 *promises, shall be fined not more than \$10,000, or imprisoned not*
 21 *more than five years, or both.”*

22 ⁵See also U.S. v. Moran, 312 F.3d 480 (1st Cir. 2002), , U.S. v. Rigas, 490 F.3d
 23 208(2d Cir. 2007), U.S. v. Jimenez, (3d Cir, 2008), U.S. v. Ross, 502 F.3d 521 (6th Cir.
 24 2007), U.S. v. Waldroop, 431 F.3d 736 (10th Cir. 2005), all regarding the definition of
 25 “bank fraud” as requiring the element of a federally insured financial institution.

26 ⁶ The current version of 18 USC 1344 provides as follows:

27 *Whoever knowingly executes, or attempts to execute, a scheme or*
 28 *artifice--*

*(1) to defraud **a financial institution**; or*

29 *(2) to obtain any of the moneys, funds, credits, assets,*
 30 *securities, or other property owned by, or under the custody or*
 31 *control of, **a financial institution**, by means of false or fraudulent*
 32 *pretenses, representations, or promises;*
 33 *shall be fined not more than \$1,000,000 or imprisoned not more than 30*
 34 *years, or both. (Emphasis added)*

China was a “financial institution” according to current U.S. law.

The Kaiping branch of the Bank of China is not a “financial institution”

Under 18 U.S.C. §20,⁷ certain branches of foreign banks may come within the definition of a “financial institution,” but **only** if that branch is “*a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978).*”

The International Banking Act of 1978 is codified at §12 U.S.C. § 3101 et seq., and provides that a “branch” of a foreign bank “*means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received.*” (Emphasis added). An “agency” of a foreign bank “*means any office or any*

⁷ 18 U.S.C. § 20 provides as follows:

Financial institution defined

As used in this title, the term “financial institution” means--

- (1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);*
- (2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;*
- (3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;*
- (4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;*
- (5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);*
- (6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;*
- (7) a Federal Reserve bank or a member bank of the Federal Reserve System;*
- (8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act; or*
- (9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978).*

1 *place of business of a foreign bank located in any State of the United States at which*
 2 *credit balances are maintained incidental to or arising out of the exercise of banking*
 3 *powers, checks are paid, or money is lent but at which deposits may not be accepted from*
 4 *citizens or residents of the United States.”*

6 The Kaiping Branch of the Bank of China is simply, and unquestionably, not a
 7 “financial institution” under 12 U.S.C. § 3101, so to the extent that paragraph 63 of the
 8 PSR appears to reference 18 §USC 1344 (by stating that the underlying offense to be
 9 applied under §2S1.1 is “a scheme and attempt to defraud against a foreign bank),
 10 paragraph 63 is therefore incorrect.

12 **The offense level of the underlying crime cannot be determined**

13 As noted above, U.S.S.G. §2S1.1. provides that the base offense level for
 14 Laundering of Monetary Instruments and Engaging in Monetary Transactions in Property
 15 Derived from Unlawful Activity is “*the offense level for the underlying offense from*
 16 *which the laundered funds were derived,”* only if . . . (B) *the offense level for that offense*
 17 *can be determined.”*⁸

19 This Court has heard much testimony at trial concerning monies going out of the
 20 Bank of China. However, it is submitted that, having heard the multiple stories from
 21 Chinese officials and other witnesses testifying from China, the months of testimony did
 22 little or nothing to prove what amount actually went from the Bank of China to the
 23

24
 25 ⁸ Application note 3 provides as follows:
 26 *Subsection (a)(2) applies to any case in which (i) the defendant did not commit the*
 27 *underlying offense; or (ii) the defendant committed the underlying offense (or would be*
accountable for the underlying offense under §1B1.3(a)(1)(A)), but the offense level for
the underlying offense is impossible or impracticable to determine

1 Defendants. The testimony of the percipient witnesses such as YU Zhen Dong, Liang
2 Shu Xiang, and HU Yong Bin was not only suspect due to questions of improper
3 treatment, but was contradictory in many instances to the testimony of the various
4 auditors and experts. As asserted above, the figure of \$482 million seems to be
5 composed of several components, even according to the government's witnesses: money
6 lost in currency speculation on behalf of the bank, money loaned to the Polyester Factory,
7 some of which is alleged to have been converted to the use of the defendants, and money
8 which has been identified as having been used to purchase goods and machinery which
9 benefitted either the Polyester Factory or the Bank, and which left both factory and Bank
10 with sizeable assets in the form of real estate and buildings. The \$482 million figure is
11 not tenable as a relevant conduct amount. Thus, the facts of this case meet neither prong
12 (A) nor prong (B) of 2S1.1(a)(1), and we must turn to 2S1.1(a)(2).

13
14
15 Section 2S1.1(a)(2) provides that the Court must use 8 plus the number of offense
16 levels from the table in §2B1.1 corresponding to the value of the laundered funds.

17
18 **Value of the laundered funds**

19 The pre-2001 amendment version of § 2S1.1 contained a table that provided for
20 an increase in the base offense level based on the "value of the funds."

21 In U.S. v. Barrios, 993 F.2d 1522 (11th Cir. 1993), which involved the application
22 of § 2S1.1 before its amendment in 2001, the defendant Barrios sent some drug proceeds
23 to another individual who deposited the funds in bank accounts in three countries. The
24 other individual later Nasser issued multiple checks back to Barrios, totaling considerably
25 more money. Barrios argued that he should be held responsible only for the initial
26
27

1 deposit, and not the interest earned. The Ninth Circuit ruled that “*whatever interest was*
 2 *earned on the original drug proceeds . . . stayed with the funds throughout the remainder*
 3 *of the laundering process.*”

4
 5 In United States v. Paley, 442 F.3d 1273 (11th Cir. 2006), the Eleventh Circuit
 6 ruled that Barrios no longer applies to the 2001 amendment to §2S1.1, which no longer
 7 uses “*the value of the funds*” as a specific offense characteristic, and no longer even
 8 contains a table. Instead, § 2S1.1 now provides that the “*value of the **laundered funds***”
 9 should be used in determining the offense level.

10
 11 Application note 1 to the amended provision provides:

12 “*Laundered funds*” means the property, funds, or monetary instrument
 13 involved in the transaction, financial transaction, monetary transaction,
 14 transportation, transfer, or transmission in violation of 18 U.S.C. § 1956
 or § 1957.

15 “*Laundering funds*” means making a transaction, financial transaction,
 16 monetary transaction, or transmission, or transporting or transferring
 17 property, funds, or a monetary instrument in violation of 18 U.S.C. § 1956
 or § 1957.

18 So what is the amount of the laundered funds? As charged in the Second
 19 Superseding Indictment, the defendants “*conspired to knowingly engage . . . in monetary*
 20 *transactions by, through, and to a **financial institution***” (Emphasis added). The
 21 “laundered funds” thus were those that related to monetary transactions by, through, and
 22 to **financial institutions**. And, as discussed above the term “financial institution” does
 23 not include the Kaiping sub-branch of the Bank of China.
 24

25 Thus, whichever way we approach the issue of relevant conduct, we are brought
 26 back to the charges of which the defendant stands convicted, which do, and could not
 27

1 include a charge of committing bank fraud against the Bank of China. Using only
 2 “laundered funds,” which were involved in “monetary transactions by, through, and to a
 3 financial institution,” the relevant conduct amount under 2S1.1 is considerably less than
 4 \$482 million.
 5

6 **The use of foreign conduct is generally disfavored under the guidelines**

7 As noted in the Second Circuit case of United States v. Azeem, 946 F.2d 13 (2nd
 8 Cir. 1991), to determine whether the use of a foreign transaction “*is proper under the*
 9 *Guidelines, we must establish their intent with respect to the issue of foreign crimes and*
 10 *activities. As in any case of statutory interpretation, our starting point must be the*
 11 *language of the Sentencing Guidelines themselves. See Lewis v. United States, 445 U.S.*
 12 *55, 60, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980). ”*
 13

14 The Azeem Court went on to hold that the use of foreign crimes under the
 15 Guidelines has a very limited and circumscribed role:
 16

17 *[T]he Guidelines . . . note that foreign sentences may not be used*
 18 *in computing a defendant's criminal history category, but may be used for*
 19 *upward departures from the otherwise applicable range. See U.S.S.G. §§*
 20 *4A1.2(h), 4A1.3(a).*

21 *From these provisions, it follows that Congress, while it has not*
 22 *remained entirely silent, has chosen to assign to foreign crimes a rather*
 23 *limited role. We decline to find that Congress intended to require that*
 24 *foreign crimes be considered when calculating base offense levels*

25 *Moreover, there are good reasons to avoid creating a new use for*
 26 *foreign crimes in sentencing. To do so would require distinguishing*
 27 *between activities that violate both domestic and foreign law and those*
 28 *which violate only domestic law or only foreign law. Examples of*
activities that violate one, but not both, foreign and domestic laws could
be the use and sale of certain drugs that would have violated our law, but
not the foreign law where sold and used, or a certain use of alcohol that
violates the foreign law where used but would not have done so under
domestic law. To permit foreign crimes to figure in fixing the base offense

level would require courts to perform a careful comparative analysis of foreign and domestic law in such instances. At some point the advantages of simplicity should prevail. This is one of them.

Were a global approach required, we would soon find it necessary to determine the appropriate evidence that must be produced by the prosecution to show that the activity occurred and that it violated foreign law. For example, we would have to decide whether an arrest or conviction by the foreign country is necessary for inclusion and, if so, whether it should be disregarded if plainly unconstitutional by our law. The fact that section 4A1.2(h) of the Guidelines allows upward departures only for foreign sentences, as opposed to uncharged crimes or arrests, apparently reflects some of these concerns. See U.S.S.G. § 4A1.2(h).

Without a clear mandate from Congress, we decline to create the complexities that the inclusion of foreign crimes in the base offense level calculation would generate. These issues are best considered and resolved by Congress.

In the case of United States v. Ford, 989 F.2d 347 (9th Cir. 1993), the Court held

It is undisputed that no domestic jurisdiction criminalizes fraud in Canada. Thus, Ford's Canadian conduct does not constitute "a criminal offense under federal, state, or local law." U.S.S.G. § 2T1.3(b)(1) application note 1.⁹ We need not reach whether the district court was correct in its holding that Ford's fraudulent acts, if perpetrated within the United States, would constitute criminal offenses. Even assuming that the district court was correct, the fact remains that Ford's acts were not perpetrated within the United States. All of Ford's income-generating fraudulent acts took place in Canada, outside of United States jurisdiction. The Commentary does not define "criminal activity" as "conduct that would constitute a criminal offense under federal, state, or local law," but as "conduct constituting a criminal offense under federal, state, or local law." *Id.* (emphasis added). The Guidelines do not speak to hypothetical criminal offenses, but to those the defendant actually committed. None of Ford's Canadian activities constitute criminal offenses in any domestic jurisdiction. (Emphasis added).

Rose permits trial courts to treat fraudulently derived funds as "relevant conduct" for sentencing purposes under S 2S1.1 only when such funds are co-extensive with the sums involved in money laundering. U.S.v. Hanley, 190 F.3d 1017, (9th Cir. 1999)

⁹ Application note 3, U.S.S.G. § 2T1.3(b)(1) has since been amended to refer to "federal, state, local, or foreign law"

1 The Guidelines themselves suggest a disinclination to include even state crimes,
 2 much less foreign crimes. Thus, the Introductory Commentary to USSG § 2B1.1 states
 3 that “[t]hese guidelines apply to offenses prosecuted under a wide variety of federal
 4 statutes, *as well as offenses that arise under the Assimilative Crimes Act.* (Emphasis
 5 added).¹⁰” By specifically referencing the Assimilative Crimes Act, which, unlike has a
 6 particularly geographic limitation, the drafters appear to have a geographically restricted
 7 view of the reach of the guidelines.
 8

9 In United States v. Chunza-Plazas, 45 F.3d 51 (2nd Cir. 01/23/1995), the Second
 10 Circuit discussed the role of foreign actions under the guidelines, noting:
 11

12 *... not even foreign sentences may be used initially in determining the*
 13 *criminal history category, but they may be used, like a pending charge, as*
 14 *the basis for an upward departure. In light of these precise provisions as*
 15 *to how charges and foreign sentences may be used, it is significant that*
 16 *nowhere do the guidelines specifically authorize the use of unrelated,*
uncharged foreign criminal conduct, or even foreign arrests, for a
departure in the criminal history category.

17 **Ex Post Facto**

18 _____The above arguments regarding the application of U.S.S.G. §2S1.1 are based on
 19 the current (2008) guidelines. Should the Court accept those arguments, the defendant
 20 will have no objection to the use of those guidelines. However, should the Court reject
 21 the above arguments regarding the relevant conduct amount, a sentence using the current
 22 guideline could potentially run afoul of the *ex post facto* prohibition.
 23

24
 25 ¹⁰ The Assimilative Crimes Act, which makes state law applicable to conduct
 26 occurring on lands reserved or acquired by the Federal government as provided in 18
 27 U.S.C. § 7(3), when the act or omission is not made punishable by an enactment of
 Congress. It is significant that the commentary specifically mentions the Act, as it very
 clearly gives a geographic limitation to the operation of this Guideline.

1 The current version of U.S.S.G. §2S1.1 refers back to §2B1.1. The PSR
2 concludes that under §2B1.1, the base offense level is 40. Using the pre-2001 version of
3 U.S.S.G. §2S1.1, which does not refer back to §2B1.1, the base offense level for the same
4 relevant conduct amount would be 33.

5
6 In United States of America v. Beardslee, 197 F.3d 378 (9th Cir. 1999), the Ninth
7 Circuit has given a concise explanation of the issues involved in the context of a
8 conspiracy whose duration, as charged, spans the time when a more severe version of the
9 guidelines went into effect:

10
11 *Normally, a district court is to apply the version of the Sentencing*
12 *Guidelines in effect on the date of sentencing. United States v. Warren ,*
13 *980 F.2d 1300, 1304 (9th Cir. 1992). However, an exception to this rule*
14 *exists where application of an amended version of the guidelines would*
15 *violate the Ex Post Facto Clause. See id. (citing United States v. Castro,*
16 *972 F.2d 1107, 1112 (9th Cir. 1992)). If the underlying offense is a*
17 *continuing offense, and continued after the relevant amendment has been*
18 *made, the amended guidelines may be applied without offending the Ex*
19 *Post Facto Clause. If, however, the underlying offense is a non-continuing*
20 *offense that occurred before the amendment, or a continuing offense that*
21 *was completed entirely before the amendment, the defendant must be*
22 *sentenced under the relevant provisions of the guidelines in effect at the*
23 *time the offense occurred. See id.*

24 Conspiracy is a continuing offense. See Castro, 972 F.2d at 1112. Thus, the
25 question arises whether the conspiracy can have ended before the date charged in the
26 Indictment as the ending date. Fortunately for Mr. XU, the Ninth Circuit has answered
27 that question in the affirmative.

28 In Beardslee, the defendant was convicted of a conspiracy that was charged as
“[b]eginning in or about October of 1989, and continuing thereafter through on or about
April 1, 1993.” Nonetheless, and despite the fact that the Indictment alleged two specific

1 acts in furtherance of the conspiracy by the defendant *after* the effective date of the later
2 guidelines, the Ninth Circuit approved the District Court's use of the 1989 sentencing
3 guidelines. In approving the District Court's approach, the Ninth Circuit stated, "*These*
4 *subsequent acts bear only a tenuous relationship to Beardslee's continuing involvement*
5 *in the conspiracy.*" In the instant case, the latest dated overt act in the Second
6 Superseding Indictment is from April 7, 2001. Thus, if the Court is not inclined to
7 follow the above arguments regarding §2S1.1, it is requested that the Court utilize a pre-
8 2001 version of the guidelines.
9

10 **Position of Trust**

11
12 XU Chao Fan respectfully objects to paragraph 67, abuse of a position of trust. In
13 U.S. v. Morales-Olivarria, 119 F.3d 8 (9th Cir., 1997), the Ninth Circuit reversed the
14 District Court's imposition of a position of trust enhancement against a defendant
15 convicted of conspiracy to bring in illegal aliens, and of bringing illegal aliens into the
16 United States in violation of, *inter alia*, 18 U.S.C. §371 based on his employment as a
17 Mexican immigration official, holding that the victim in that case was the United States,
18 and that, "*analyzing the crime from the perspective of the United States, the 'victim' of*
19 *this crime, it is clear that Morales-Olivarria held no special position of trust vis-a-vis the*
20 *United States. His position as a Mexican immigration official is therefore not grounds for*
21 *applying the 'position of trust' enhancement.*"
22
23

24 In the instant case, as discussed in several sections above, the United States holds
25 no brief to protect the people and institutions of China from criminal behavior. Indeed,
26 the attorneys for the government have many times stated that this case is not about a
27
28

1 crime against China, but a crime against the United States. Thus, it is submitted that the
2 victim in the instant case is likewise the United States. A role adjustment under §3B1.3
3 is therefore improper.
4

5 **Relocation to another jurisdiction; scheme committed from outside United States**

6 The PSR recommends a two level upward under §2B1.1(b)(9)(A). This
7 adjustment makes no sense in the current situation. First of all, there is no proof that he
8 “relocated to another jurisdiction in the effort to avoid law enforcement.” Rather, the
9 indication is that he was continuing to battle a civil suit in Canada, and had no apparent
10 reason to know that he was facing arrest, so it is speculative at best to say he was
11 relocating for any reason other than to find a lower cost of living. As to the “fraudulent
12 scheme being committed *from* outside the United States, it would be much more accurate
13 to say that the scheme simply was committed outside the United States entirely. There
14 has never been any evidence whatsoever that any defendant sought to, tried to, or did
15 defraud any American, or anyone in America *from* outside the United States. This
16 provision would seem to apply to someone who, for instance, withdrew money from an
17 American’s bank account, while sitting safely in Nigeria. That is simply not the case
18 here.
19
20

21 **Motion for Downward Departure**

22
23 Mr. XU hereby moves for a downward departure on several grounds, more fully
24 discussed below. As the Court is free to choose a sentence that is outside the guideline
25 range even without granting a departure, the substantive discussion of the bases for a
26 departure is included below with the discussion of the factors found in §3553.
27
28

**Appropriate Sentence That Is Sufficient, But Not
Greater than Necessary, Under 18 U.S.C. § 3553 (a)**

In U.S. v. Rodriguez-Rodriguez, 441 F.3d 767 (9th Cir. 2006), the Ninth Circuit stated, “[m]any times we have emphasized that a district court’s mandate is to impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in [§ 3553(a)(2)].”

Since the case of U.S. v. Booker, 543 U.S. 220 (2005), in which it was held that the sentencing guidelines are advisory rather than mandatory, it has been the task of the District Court to apply each of the factors set forth in 18 U.S.C. § 3553 (a) must therefore be considered in fashioning the appropriate sentence. These factors include (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the advisory guideline range; (5) any pertinent policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities; and (7) the need to provide restitution to any victims of the offense.

In Rita v. U.S., 127 S.Ct. 2456 (2007), the United States Supreme Court stated that, although a Court of Appeal may treat a guideline sentence imposed by a District Court as presumptively reasonable, the presumption was “an appellate court presumption

1 [that] applies only on appellate review.” They therefore held that “the sentencing court
2 does not enjoy the benefit of a legal presumption that the Guidelines sentence should
3 apply.” Id.
4

5 The Supreme Court likewise held in Gall v. United States, 128 S.Ct. 586 (U.S.
6 12/10/2007) that the Circuit had improperly reversed the District Court’s sentence of
7 probation, when the guideline range called for 30 to 37 months of imprisonment. The
8 Supreme Court stated:

9 *A district court should begin by correctly calculating the applicable*
10 *Guidelines range. The Guidelines are the starting point and initial*
11 *benchmark but are not the only consideration. After permitting both*
12 *parties to argue for a particular sentence, the judge should consider all of*
13 *18 U. S. C. §3353(a)'s factors to determine whether they support either*
14 *party's proposal. He may not presume that the Guidelines range is*
15 *reasonable but must make an individualized assessment based on the facts*
16 *presented. If he decides on an outside-the-Guidelines sentence, he must*
17 *consider the extent of the deviation and ensure that the justification is*
18 *sufficiently compelling to support the degree of variation. He must*
19 *adequately explain the chosen sentence to allow for meaningful appellate*
20 *review and to promote the perception of fair sentencing. In reviewing the*
21 *sentence, the appellate court must first ensure that the district court made*
22 *no significant procedural errors and then consider the sentence's*
23 *substantive reasonableness under an abuse-of-discretion standard, taking*
24 *into account the totality of the circumstances, including the extent of a*
25 *variance from the Guidelines range, but must give due deference to the*
26 *district court's decision that the §3553(a) factors justify the variance. That*
27 *the appellate court might have reasonably reached a different conclusion*
28 *does not justify reversal.*

22 In U.S. v. Sachsenmaier, 491 F.3d 680 (7th Cir. 2007) the Court held that, “[t]he
23 district courts must calculate the advisory sentencing guideline range accurately, so that
24 they can derive whatever insight the guidelines have to offer, but ultimately they must
25 sentence based on 18 U.S.C. §3553(a) without any thumb on the scale favoring a
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27
28

1 guideline sentence.”

2 **Compulsive Gambling**

3 In United States v. Cockett, 330 F.3d 706, 2003 Fed.App. 0166 (6th Cir. 2003),
4 the defendant was charged with aiding and assisting in the preparation of a false tax
5 return. The District Court departed downward from a guideline range of 15 - 21 months
6 to probation, based on the defendants psychological issues. The Ninth Circuit upheld the
7 sentence, stating:
8

9 *The second question is whether it is possible to conclude that Cockett's*
10 *mental disorders contributed to her offense. The government lays out a*
11 *very convincing argument that Cockett was intellectually sophisticated,*
12 *understood that she was lying on the forms and violating the law, and was*
13 *in control of her behavior to the point where she sought out clients and*
14 *assisted these clients in filing false tax returns in order to receive refunds.*
15 *However the psychologists contend that Cockett was significantly*
16 *impaired in her ability to understand that what she was doing was wrong.*
17 *Not that she didn't know that she was technically lying on the forms, or*
18 *that she did not understand that she was helping the women for whom she*
19 *prepared the taxes to lie, but rather that her judgment was impaired so*
20 *that she understood her actions as helping these women, and thus she had*
21 *rationalized the lies.*

22 Thus, the mere fact that a convicted defendant is educated, or carried on a
23 sophisticated criminal activity, is no bar to the use of §5K2.13.

24 In United States v. Ruff, 535 F.3d 999 (9th Cir. 08/01/2008), despite a guideline
25 range of 30-37 months, the Ninth Circuit approved the District Court’s sentence of one
26 year and one day in a residential center, where the defendant could receive counseling for
27 his gambling addiction, participate in work release, and have visitations with his 11 year
28

old son. The Court approvingly¹¹ noted that the District Court had cited:

mitigating factors, including: (1) Ruff's history of strong employment; (2) his cooperation and "clear[] remorse[]"; (3) his support from his siblings; (4) the absence of potential risk to the public and the appropriateness of restitution; and (5) his mental health issues and gambling addiction. With respect to this final factor, Ruff admitted that he had lost approximately \$200,000 to compulsive gambling. . . . (emphasis added).

In United States v. Vieke, 348 F.3d 811 (9th Cir. 11/03/2003), the Ninth Circuit approved the District Court's downward departure under §5K2.20 based in part on the "pathological nature of the [gambling] addiction" Although the district court in Vieke declined to depart on the basis of diminished capacity, this case is notable as a pre-Booker case in which a departure on the basis of a gambling addiction was nonetheless granted by the District Court, and approved by the Ninth Circuit.

In United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000), the Circuit court upheld a downward departure under § 5K2.13 for a defendant convicted of fraud, who suffered from a gambling compulsion.

In U.S. v. Liu, 267 F.Supp.2d 371 (EDNY 2003), the District Court departed from the Guidelines based on a report using the criteria found in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000), or as it is more commonly known, DSM-IV.

Compulsive gambling has gained recognition as a legitimate psychological condition in various areas of the law. See, e.g., Calling a Lemon a Lemon: Regulating

¹¹ The Ninth Circuit referred to "the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence."

1 Electronic Gambling Machines To Contain Pathological Gambling, Bradley S. Fiorito,
 2 100 Northwestern U. L. Rev. 1325 (2006).

3 In the instant case, Mr. XU has been evaluated by Dr. Eddie Chiu, a prominent¹²
 4 Chinese-American psychologist who focuses on Asian-Americans with gambling
 5 disorders. Dr. Chiu has prepared a report which likewise utilizes the criteria found in the
 6 DSM-IV, and is based on testing including the South Oaks Gambling Screen (SOGS),
 7 and the Hopkins Symptom Checklist (Chinese Version). Dr. Chiu concludes as follows:

8
 9 *Based upon the clinical interviews and relevant screening tools, Mr. Xu*
 10 *has experienced mild depression and he is a pathological gambler. His*
 11 *clinical presentation appears to meet the DSM-IV criteria for the*
 12 *following diagnosis:*

13 *Axis I: Depressive Disorder, NOS Adjustment Disorder with Depressed Mood (Chronic S*
 14 *Pathological Gambling*

15 Based on his meeting the DSM-IV criteria, it is submitted that Mr. XU should
 16 receive a downward departure from the appropriate Guideline range under §5K1.13, or in
 17 the alternative, that after the Court has determined Mr. XU's offense level under the
 18 Guidelines (including any departures) that the Court should take his mental condition into
 19 account as a mitigating factor under § 3553.

20 Sentencing disparity

21 _____ Even prior to Booker, the Ninth Circuit has recognized that the need to avoid
 22 _____

23 ¹² See, e.g. <http://www.sacbee.com/ourregion/story/1681279.html>
 24 http://asianweek.com/2001_04_06/bay1_gambling.html
 25 [http://www.casinogamblingweb.com/gambling-news/casino-gambling/chinese_speaking_](http://www.casinogamblingweb.com/gambling-news/casino-gambling/chinese_speaking_problem_gambling_therapy_drawing_rave_reviews__50641.html)
 26 http://www.asianmentalhealth.org/Chiu%20Gamblers_New.pdf
 27 [www.coalitionny.org/news_resources/briefs/2007/documents/GamblingConferenceProgra](http://www.coalitionny.org/news_resources/briefs/2007/documents/GamblingConferenceProgram.doc)
 28 [m.doc](http://www.coalitionny.org/news_resources/briefs/2007/documents/GamblingConferenceProgram.doc)

1 sentencing disparity could justify a substantial downward departure. Thus, in *United*
2 *States v. Tzoc-Sierra*, 387 F.3d 978 (9th Cir. 2004), the Ninth Circuit upheld a departure
3 down to 36 months, despite a guideline range which called for 46 to 57 months. In
4 upholding the sentence, the Court noted that “[i]t seems apparent from the record . . .
5 that the factor that was of paramount importance to the district court was the disparity
6 between Tzoc-Sierra's recommended sentence and the sentences of his co-defendants.
7

8 Similarly, in *U.S. v. Daas*, 198 F.3d 1167 (9th Cir. 1999), the Court held:

9
10 *Downward departure to equalize sentencing disparity is a proper*
11 *ground for departure under the appropriate circumstances. See 28*
12 *U.S.C.S 991(b)(1)(B); U.S.S.G. Ch. 1, Pt. A, p.s. 3. ("Congress sought*
13 *reasonable uniformity in sentencing by narrowing the wide disparity in*
14 *sentences imposed for similar criminal offenses committed by similar*
15 *offenders."). Indeed, a central goal of the Sentencing Guidelines is to*
16 *eliminate sentencing disparity. See Koon, 518 U.S. at 113 ("The goal of*
17 *the Sentencing Guidelines is, of course, to reduce unjustified disparities*
18 *and so reach towards the evenhandedness and neutrality that are the*
19 *distinguishing marks of any principled system of justice.").*

20 *Here, the record indicates that the district court believed*
21 *incorrectly that it lacked the authority to depart downward based on*
22 *sentencing disparity. Because the district court actually had this authority*
23 *but mistakenly failed to exercise it to determine whether the facts here*
24 *warranted departure, this court remands for findings as to whether a*
25 *downward departure is appropriate.*

26 Post Booker, the ability of the District Court to impose a lower sentence to avoid
27 sentencing disparity has increased. Thus, in *United States v. Krutsinger*, 449 F.3d
28 827(8th Cir. 2006), the Eighth Circuit upheld the District Court's imposition of a twenty
four month sentence, despite a guideline range of seventy to eighty-seven months, where
the principal reason for the lower sentence was the District Court's attempt to avoid
sentencing disparity. The Eighth Circuit stated:

1 *We are assisted in this case by a district judge that made a thorough and*
 2 *careful record of the reasons for the sentence in each case. The judge was*
 3 *clearly troubled by, and ultimately determined his sentence based on, the §*
 4 *3553(a)(6) factor: “the need to avoid unwarranted sentence disparities*
 among defendants with similar records who have been found guilty of
 similar conduct.”

5 The Court went on to hold:

6 *We cannot say the district court abused its discretion in fashioning a*
 7 *sentence that attempted to address the disparity in sentences between two*
 8 *nearly identically situated individuals who committed the same crime in*
 9 *the same conspiracy. The only distinction the government points to is the*
 10 *timing of the indictments. There will be many cases where a defendant*
 11 *receives a higher Guidelines range when he or she pleads or is tried later*
 in the conspiracy, after the government has more fully developed its case.
 However, under the facts of this case, we cannot say the district court
 improperly applied § 3553(a)(6) or abused its discretion.

12 In Krutsinger, the District Court’s sentence, upheld by the Circuit, attempted to
 13 avoid disparate sentences, even though, as the Eighth Circuit noted “[b]y the time she
 14 was sentenced, the government had developed more information about the scope of the
 15 conspiracy and was by then able to attribute [additional amounts of controlled
 16 substances as relevant conduct].” By contrast, in the instant case, the government has
 17 not developed any more information about the scope of the conspiracy since the time of
 18 Yu Zhen Dong’s sentencing that would indicate that additional or greater amounts of
 19 money were involved in the conspiracy. Rather, the recommendation of the PSR, in
 20 which the government has concurred, simply uses a figure, \$482 million, which was
 21 equally known to the government at the time of Yu Zhen Dong’s sentencing. If there was
 22 a need to avoid disparity in Krutsinger, that need is far greater in the instant case, where
 23 YU Zhen Dong and XU Chao Fan had precisely the same position in the Bank, were
 24

1 alleged to have been involved in the same conspiracy for the same length of time, and
 2 where any dollar amounts concerned were equally known to the government at the time
 3 of YU's sentencing as they are now.
 4

5 **Harshness of presentence confinement**

6 In United States v. Pressley, 345 F.3d 1205 (11th Cir. 2003), the Court of Appeal
 7 reversed the sentence, due to the District Court's incorrect belief that the Court was
 8 prohibited from giving a downward departure based on *[a six-year period of presentence*
 9 *confinement in 23-hour-a-day lockdown* . The Circuit Court therefore remanded the case
 10 for the District Court to impose *"the two and a half year downward departure the district*
 11 *court said it would consider appropriate if it had the power so to depart."*
 12

13 In United States v. Davoudi, 172 F.3d 1130 (9th Cir. 1999), the Court stated that,
 14 *"Davoudi correctly notes that the district court had the legal discretion to depart*
 15 *downward because deportable aliens may be unable to take advantage of the up to six*
 16 *months of home confinement authorized by 18 U.S.C. §3624©."*
 17

18 **Cost of Incarceration**

19 In U.S. v. Angelos, 345 F.Supp.2d 1227 (D. Utah 2004), the Court departed
 20 downward based on the cost of holding the defendant in prison, stating:
 21

22 *Given that holding a person in federal prison costs about \$23,000 per*
 23 *year, the 61-year-sentence the court is being asked to impose in this case*
 24 *will cost the taxpayers (even assuming Mr. Angelos receives good time*
 25 *credit and serves "only" 55-years) about \$1,265,000. Spending more than*
 26 *a million dollars to incarcerate Mr. Angelos will prevent future crimes by*
 27 *him and may well deter some others from being involved with drugs and*
 28 *guns. But that money could also be spent on other law enforcement or*
social programs that in all likelihood would produce greater reductions in
crime and victimization."

1 In the instant case, the logic seems much more compelling. Mr. XU has harmed
 2 no Americans with his actions, and if he someday faces charges in China for any crimes
 3 he is accused of, well, that is their concern, not ours. It seems almost bizarre that the
 4 United States government should be charged with locking up a man whose crimes as
 5 charged and convicted have only a tangential connection to this country.
 6

7 **Tail wagging the dog**

8 It certainly seems that this case is one where the tail of Mr. XU's involvement in
 9 this country is wagging the very large dog of the activities he is alleged to have
 10 committed in China. This is similar to the situation in the case of U.S. v. Threadgill, 172
 11 F.3d 357 (5th Cir. 1999). In that pre-Booker case, the defendants were convicted of two
 12 offenses, illegal gambling, and money laundering. Pursuant to USSG §2E3.1, the
 13 guideline level for the gambling convictions was 12, regardless of the amount of money
 14 involved.¹³ Based on the relevant conduct amount, the guideline for the money
 15 laundering convictions was 21. The District Court departed downward from the much
 16 higher money laundering. On appeal of the sentence by the government, the Fifth Circuit
 17 upheld the departure, and went so far as to say that they "*first found that the defendants'*
 18
 19
 20

21 ¹³ Although not specifically cited in the opinion, §2E3.1(a) provides as follows:
 22 *Gambling Offenses; Animal Fighting Offenses*

23 *Base Offense Level: (Apply the greatest)*

24 (1) 12, if the offense was (A) engaging in a
 25 gambling business; (B) transmission of wagering information; or (C)
 26 committed as part of, or to facilitate, a commercial gambling operation;
 27 or

28 (2) 10, if the offense involved an animal fighting
 venture; or

(3) 6, otherwise.

1 *money laundering activities were incidental to the gambling operation. The court next*
2 *found that the defendants' conduct was atypical because the defendants never used the*
3 *laundered money to further other criminal activities. Based on those two factors, the*
4 *district court departed downward under U.S.S.G. § 5K2.0. . . .”*
5

6
7 Respectfully submitted,

8 DATED this 7 day of April, 2009
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10
11 _____ /s/

12 MITCHELL POSIN, ESQ.
13 Counsel for Defendant
14 XU Chao Fan
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